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No. 75-754

In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the evidence was insufficient to support his conviction for conspiracy to distribute narcotics, and that he was prejudiced by the introduction of certain hearsay testimony.

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted of conspiring to distribute amphetamines, a Schedule III controlled substance, in violation of 21 U.S.C. 846.[1] He was sentenced to five years' imprisonment, to be followed by two years' special parole, and a $15,000 fine (Pet. App. B 23-24). The court of appeals affirmed (Pet. App. A 19-22).

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[1]Petitioner's co-defendant, Bobby Ray Jordan, pleaded guilty and testified for the government. He subsequently was sentenced to two years' imprisonment followed by two years' special parole, the sentence to run concurrently with a prior sentence on another drug conviction.

The evidence showed that in June and July 1974, Bobby Ray Jordan agreed to sell amphetamine tablets to Fred Taylor, an undercover narcotics officer to whom Jordan had previously sold amphetamine tablets which petitioner had supplied (Tr. 48-52).[2] Jordan and Taylor confirmed the arrangement after petitioner agreed to supply Jordan with the amphetamines (Tr. 53-55).

On the day of the sale, petitioner met Jordan at a supermarket parking lot and assured Jordan that the amphetamine tablets were in the trunk of petitioner's automobile. Petitioner then left his automobile in the parking lot and drove with Jordan to the designated meeting site; when he observed Taylor and another undercover officer, petitioner told Jordan that the purchasers were "cops." Petitioner hurriedly drove Jordan's automobile away from the site, leaving Jordan behind (Tr. 57-58). Jordan explained to Taylor that petitioner was getting the amphetamine pills. When Taylor and Jordan returned to the supermarket parking lot, however, petitioner's automobile was gone. Jordan then was arrested (Tr. 63-65).

1. Petitioner contends that the evidence was insufficient to support his conviction. As the court of appeals noted, however, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence was sufficient to support the conviction (Pet. App. A 20-21):

> From the record it is obvious that the relationship between Brown and Jordan was not a casual one. Jordan testified that Brown was one of his sources of supply for narcotics. It was shown that Jordan had previously sold some 3,000 amphetamine tablets to police officer Taylor on June 24, 1974. Thereafter,

[2]"Tr." refers to the one volume trial transcript.

Jordan called Taylor about twice a week concerning the purchase of a large quantity of amphetamine tablets. Jordan discussed this proposed sale with Brown, and then advised Taylor that the tablets were being furnished by a man named "Don" and only 150,000 were available. Definite arrangements were made for sale at that time. Jordan advised Taylor that he had the tablets and that he and another man would meet them at a designated place. It then developed that the price would be 10½¢ each for 150,000 tablets. A short time later Brown and Jordan came to the place where the transaction was to be consummated. When they arrived Brown saw Taylor and told Jordan that the men were "cops" and hurriedly drove away after Jordan had jumped from the car. Jordan told Taylor that Brown then had 150,000 tablets in the trunk of the car which were intended to be delivered to Taylor. After Brown left, Jordan continued in his attempt to obtain the tablets but was unable to do so before his arrest. At that time the necessary elements were shown to establish the conspiracy and there were affirmative acts by Brown and Jordan to carry out its purpose.

2. Petitioner further contends that he was prejudiced by testimony of officer Taylor which related statements made by Jordan following Jordan's arrest, after the conspiracy had ended.[3] The error, if any, of admitting this hearsay testimony was harmless, however, since Jordan subsequently took the stand and reiterated each of the

[3]Taylor testified that after petitioner's departure Jordan stated that petitioner possessed the amphetamine pills and was driving to the narcotics transfer point (Tr. 20-21) and that petitioner suspected Taylor and his associate were narcotics officers (Tr. 19, 20).

statements which Taylor had related (Tr. 56-58, 61-63), thereby giving petitioner full opportunity to cross-examine him. Moreover, the other evidence of petitioner's guilt was overwhelming. *Chapman* v. *California,* 386 U.S. 18; *Harrington* v. *California,* 395 U.S. 250.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[4]Petitioner's contention that the government introduced evidence of prior narcotics sales by Jordan which did not involve petitioner (Pet. 16) is incorrect. The government introduced evidence of only one other narcotics sale by Jordan; petitioner supplied the narcotics for that sale (Tr. 51-52).